IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 834 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GULAM MUSTUFA @ SONE KI TOPI RASULMIYA SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 834 of 2003

MS SN QURESHI for Petitioner

MR KP RAVAL AGP for Respondent Nos. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/06/2003

ORAL JUDGEMENT

1. Heard Ms.S.N.Qureshi, learned advocate for the petitioner and Mr.K.P.Raval, learned AGP for the respondents.

2. In the present petition, Rule has been issued by this Court [Coram : P.B.Majmudar,J.] on 31.01.2003, made

it returnable after six weeks. In the present petition, the order of detention dated 06.01.2003 passed by the District Magistrate, Kheda District, at Nadiad under Sections 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (hereinafter be referred to as "the PASA Act") has been challenged by the petitioner detenu. The name of the detenu is Gulam Mustufa @ Sone Ki Topi Rasulmiya Shaikh. The order of detention has been executed against the petitioner, he was in District Jail Nadiad. As per endorsement made by the petitioner reflected at page 14, the offences registered against the petitioner at Mahudha Police Station vide C.R.No.156/2002 under Sections 147, 148, 149, 395, 435 and 337 of I.P.C. The alleged offences committed by the petitioner on 11.11.2002, he was arrested on 27.11.2002 by the Police Authority. He has approached before the Sessions Court, by way of filing an application for bail and his bail application was rejected by the Sessions Court on 17.12.2002. There is nothing on record, whether he has approached to the High Court with a prayer to grant bail or not. So at the time, when the order of detention has been executed against the petitioner, he was in judicial custody. In all, three statements of the secret witnesses were recorded by the Sponsoring Authority. The first statement of the witness was recorded on 29.11.2002 and the same was verified by the Dy. Commissioner of Police on 05.12.2002 and again the same has been verified by the Detaining Authority on 02.01.2003. The second statement of the witness was recorded on 30.11.2002 and the same was verified by the Dy. Commissioner of Police on 05.12.2002 and again the same was verified by the Detaining Authority on 02.01.2003. The third statement of the witness was recorded on 02.12.2002 and the same was verified by the Dy. Commissioner of Police on 05.12.2002 and again the same was verified by the Detaining Authority on 02.01.2003. The order of detention has been passed on 06.01.2003.

3. Ms.S.N.Qureshi, learned advocate for the petitioner has submitted that the order of detention has challenged on various grounds, but only one ground is enough to vitiate the order of detention. She has submitted that when the order of detention has been passed against the petitioner, the petitioner was in judicial custody. The Detaining Authority has not applied his mind in respect to likelihood of the petitioner to be released on bail from the judicial custody. That aspect has not been considered by the Detaining Authority and, therefore, it means non-application of mind. She has also submitted that there was no material before the Detaining Authority,

whether the petitioner has approached to the High Court with a prayer to grant bail or not. Eventhough, the Detaining Authority has considered that in the event, if the bail is granted by the High Court, the petitioner is indulging the same activities in the society, which disturbed in the public interest. Therefore, she has submitted that the order of detention has been passed without application of mind and the same is required to be quashed and set aside.

4. Mr.K.P.Raval, learned AGP for the respondents has submitted that the Detaining authority has rightly appreciated all the materials, which were placed before him, by the Sponsoring Authority. He has also submitted that the Detaining Authority has rightly passed the order of detention, after considering all the materials. He has also submitted that the detail affidavit-in-reply has filed by the Detaining Authority and the State Government. He has also submitted that the Detaining Authority has rightly appreciated likelihood bail application filed by the detenu, on the basis of private information which is at page-65, and that the petitioner is making efforts to file an application before the High Court. Therefore, likelihood of bail application is ascertained by the Detaining Authority. He has also submitted that the Detaining Authority has rightly come to the conclusion that even the bail application is granted by the High Court, the petitioner is again indulging same activities in the society and, therefore, the detention order has rightly been passed by the Detaining Authority.

5. I have considered the submissions made by learned advocates for both the parties. I have also perused the order of detention and also perused the reasons given by the authority. At the time of passing the order as well as the execution order, the petitioner was in judicial custody, this has been reflected at Page-18 in last paragraph. It is also not disputed that the bail application, rejected which was submitted by the petitioner before the Sessions Court on 07.12.2002. There is no material before the Detaining Authority, whether the petitioner has filed the bail application before the High Court or not or whether any order passed by the High Court in respect to the petitioner or not. At the time of passing the order of detention, the petitioner was in judicial custody. At page-22 also, there is an observation and there is a reason that there is likelihood of the petitioner to be released on bail, but there is no discussion or consideration, whether likelihood of the petitioner to be released on bail by

the Detaining Authority or not. The Hon'ble Apex Court in the case of Amritlal and other Vs. Union Government through Secretary, Ministry of Finance and others, reported in AIR 2000 S.C. 3675, has considered the said aspect. The question which has been raised in the present petition, has been examined by this Court today in three cases i.e. Special Civil Application Nos.2866, 2867 & 2868 of 2003 and detail order has been passed on 10.06.2003, on relying upon the decision in the case of Amritlal and other [Supra], reported in AIR 2000 S.C. 3675 and come to the conclusion that two aspects are required to be examined by the Detaining Authority, when the detenu is already in judicial custody then the Detaining Authority must be satisfied on the basis of available material about the likelihood of his moving application for bail. Therefore, considering the observation made by this Court in the aforesaid three cases, according to my opinion, the order of detention is vitiated.

6. In the result, the present petition is allowed. The order of detention dated 06.01.2003 passed by the District Magistrate, Kheda District, Nadiad against the detenu Shri Gulam Mustufa @ Sone Ki Topi Rasulmiya Shaikh detained at Porbandar District Jail is hereby quashed and set aside. The petitioner, unless is required to be detained in some other case, be released forthwith. Rule is made absolute accordingly. Direct service is permitted.

[H.K.Rathod, J.]

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